COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

)

Re: Stow Municipal Electric Department)

v. Hudson Light and Power Department,) D.T.E. 94-176-C

on Remand)

)

BRIEF OF STOW MUNICIPAL ELECTRIC DEPARTMENT

I. INTRODUCTION AND STATEMENT OF PROCEEDINGS.

A. Introduction.

Stow Municipal Electric Department (SMED) is pleased to submit this brief to the Department of Telecommunications and Energy (DTE or department). SMEDÕs brief is organized as follows. Section I(B) summarizes the long history of prior proceedings in this case, covering D.P.U. 93-124, D.P.U. 94-176, the SJC appeal,[(1)] and D.T.E. 94-176-C (on remand). Section I(C) lists SMEDÕs seven previous briefs on the merits of the issues in this case. Section I(D) contains brief conclusions. Section II discusses an important preliminary point: merely changing the denomination of this dispute (from a Òstranded cost recoveryÓ dispute in D.P.U. 94-176 to a Òslice-of-the-system forced transferÓ dispute in D.T.E. 94-176-C)

does not change the underlying issues, or the merits of the dispute. Section III sets forth the numerous reasons why Hudson Light and Power Department (HL&PD) can not include a forced Òslice-of-the-systemÓ in the sale as a matter of law. Section IV sets forth the numerous reasons why HL&PD should not be allowed to include a forced Òslice-of-the-systemÓ as a matter of sound public policy. Section V sets forth SMEDÕs answers to the Hearing OfficerÕs five briefing questions. Section VI sets forth brief overall conclusions.

B. Prior Proceedings.

1. D.P.U. 93-124.

HL&PD, a municipal lighting plant operating pursuant to G.L. c. 164, ¤¤34-69, additionally serves the town of Stow (Stow) pursuant to St. 1898, c. 143. Stow took the first of two required town meeting votes to separate from the HL&PD system, and to create SMED, on May 4, 1993. Two separate town meeting votes, no more than thirteen months apart and no less than two months apart, are required for a town to acquire a municipal light plant. G.L. c. 164, ¤36. In order to clarify its obligations before taking the second, binding town meeting vote, Stow petitioned the Department of Public Utilities (DPU or department) on June 30, 1993 for an advisory opinion pursuant to 220 C.M.R. 2.08. Stow requested a ruling to the effect that the severance damages contemplated by the relevant statutes (St. 1898, c. 143 and G.L. c. 164, ¤¤42 and $43^{(2)}$) necessarily exclude as a matter of law economic and consequential damages related to loss of sales by HL&PD to Stow. This request for an advisory opinion was docketed by the department as D.P.U. 93-124. After various motions and briefs were filed by various parties, the department issued a decision on May 5, 1994. This decision denied HL&PDÕs motion to dismiss StowÕs petition and also declined to issue any advisory opinion in response to StowÕs June 30, 1993 petition. Re Town of Stow, D.P.U. 93-124-A, pp. 3-6, 12-13 (May 5, 1994). Stow filed a timely motion for reconsideration of this DPU declination to issue an advisory opinion on May 11, 1994. The department denied StowÕs motion for reconsideration, and issued a clarification of its May 5, 1994 decision, on May 24, 1994. Re Town of Stow, D.P.U. 93-124-B, pp. 1-2 (May 24, 1994). Despite the lack of guidance from the DPU which an advisory opinion might have provided, Stow took the second required town meeting vote to separate from the HL&PD system on June 1, 1994. Both Stow town meeting votes (the May 4, 1993 vote and the June 1, 1994 vote) were certified to the department pursuant to G.L. c. 164, ¤37. This second vote was necessarily taken (due to the 13-month limitation stated in G.L. c. 164, ¤36) without any guidance

from the department that the requested advisory opinion might have provided. No appeal was taken by any party from the departmentÕs decisions in D.P.U. 93-124-A or 93-124-B.

2. D.P.U. 94-176.

SMED filed its petition before the department for a determination of value pursuant to St. 1898, c. 143 and G.L. c. 164, ¤¤42 and 43 on November 22, 1994. This petition was filed within the allowed 30-day period after the required 150-day negotiation period after the second (June 1, 1994) Stow town meeting vote. In other words, this petition was filed between 150 days and 180 days after June 1, 1994, as required by G.L. c. 164, ¤43. This petition was docketed by the department as D.P.U. 94-176. HL&PD intervened as a full intervenor in D.P.U. 94-176, and filed its answer to SMEDÕs petition on December 12, 1994. Massachusetts Municipal Wholesale Electric Company (MMWEC) was permitted to participate as a limited intervenor, on the limited issue of how any impact that this dispute between SMED and HL&PD might have on MMWEC should be taken into account (if at all) by the department as a Òpublic interest factorÓ pursuant to G.L. c. 164, ¤43. Stow Municipal Electric Department, D.P.U. 94-176 (Hearing Officer Ruling), p. 6 (March 20, 1995).[3]

Pre-hearing briefs, and initial pre-filed testimony, were filed by the parties on April 6, 1995. Discovery commenced after those filings, and rebuttal pre-filed testimony was filed on May 31, 1995. Evidentiary hearings were held on June 12, 13, 14, 15 and 19, 1995. Post-hearing

initial briefs were filed on August 31, 1995 and post-hearing reply briefs were filed on September 14, 1995.

The departmentÕs decision, which issued on February 16, 1996, made three major factual and/or legal determinations. First, it made a determination that the HL&PD tangible utility property within the town of Stow should be valued at $2,425,930 by applying a 50% weighting to original cost less depreciation (OCLD) and a 50% weighting to reproduction cost new less depreciation (RCNLD). Stow Municipal Electric Department, D.P.U. 94-176, pp. 57-66 (February 16, 1996). Second, it made a determination that no HL&PD ownership agreements in generating plants and no wholesale power purchase contracts entered into by HL&PD should be included in the property purchased by SMED, and further that no Òstranded costÓ damages, so-called, related to loss of sales by HL&PD to Stow, should be included as an element of damages.

Stow Municipal Electric Department, D.P.U. 94-176, pp. 39-48 (February 16, 1996). Third, it made a determination that no consequential damages for HL&PDÕs alleged reduced utilization of power delivery properties and for service equipment should be awarded. Stow Municipal Electric Department, D.P.U. 94-176, pp. 102-105 (February 16, 1996). At HL&PDÕs request, and over SMEDÕs objection, the department stayed its own February 16, 1996 decision. Stow Municipal Electric Department, D.P.U. 94-176-A, pp. 2-3 (March 15, 1996).

3. The SJC Appeal.

All three intervenors (SMED, HL&PD, and MMWEC) appealed the DPUÕs February 16, 1996 decision to the SJC. The SJC upheld the DPUÕs 50-50 weighting of OCLD and RCNLD as providing the proper basis for evaluating HL&PDÕs tangible plant in Stow. Stow Municipal Electric Department v. Department of Public Utilities, 426 Mass. 341, 344-347, 353 (1997). The SJC also upheld the DPUÕs determination that no consequential damages related to reduced utilization of other HL&PD plant had been demonstrated by HL&PD. Stow Municipal Electric Department v. Department of Public Utilities, 426 Mass. 341, 347-348, 353 (1997). The SJC vacated, and remanded to the department, the DPUÕs determination with respect to stranded costs. Stow Municipal Electric Department v. Department of Public Utilities, 426 Mass. 341, 348-353 (1997).

4. D.T.E. 94-176-C [Remand].

The SJCÕs remand was effective on December 30, 1997. Stow, 426 Mass. 341 (1997). SMED wrote two letters to the DTE, on April 8, 1999 and on May 12, 1999, requesting that the DTE convene a procedural conference and initiate the remand proceedings. SMED filed a motion for a procedural conference, and a briefing schedule, on June 23, 1999. The Hearing Officer issued an order, requesting comments from the parties on various topics, on June 28, 1999. SMED and the other parties filed their responsive comments to this order on July 26, 1999. SMED wrote two further letters to the DTE, again requesting that the remand proceeding be conducted with all due dispatch, on October 7, 1999 and on March 7, 2000. The Hearing Officer issued another order, again requesting comments on certain topics from the parties, on March 16, 2000. SMED and the other parties filed their responsive comments to this order on April 11, 2000. On

April 18, 2000, SMED filed a motion for summary disposition, along with a supporting memorandum of law. After further procedural orders, and discovery, four days of hearings were held on August 8, 9, 14 and 15, 2000. HL&PD filed its response to SMEDÕs April 18, 2000 motion for summary disposition on August 22, 2000. Simultaneous initial briefs are to be filed on September 6, 2000, and simultaneous reply briefs are to be filed on September 14, 2000.

C. SMEDÕs Prior Briefs.

Many of the issues before the department have been briefed by the parties repeatedly. In order to assist the Hearing Officer and the department in their review of a record that now stretches over a period of more than seven years, from June, 1993 to September, 2000, SMED provides the following listing of the seven prior SMED briefs on the merits of this dispute, along with the subject matters of those briefs.

Date	Docket	Subject Matter
October 1, 1993	D.P.U. 93-124	Why HL&PD Can Not Collect any Consequential Damages, Including Stranded Cost Consequential Damages, from SMED, As A Matter of Law
April 6, 1995	D.P.U. 94-176	SMED Pre-Hearing Brief (all issues)
June 16, 1995	D.P.U. 94-176	SMED Brief on Prudence Issues
August 31, 1995	D.P.U. 94-176	SMED Post-Hearing Initial Brief (all issues)
September 14, 1995	D.P.U. 94-176	SMED Post-Hearing Reply Brief (all issues)
July 26, 1999	D.P.U. 94-176-C	SMED Comments in Response to Hearing OfficerÕs June 28, 1999 Order (includes discussion of why HL&PD can not recover damages as a matter of law)
April 18, 2000	D.P.U. 94-176-C	SMED Memorandum of Law in Support of Summary Disposition Motion (includes discussion of why HL&PD can not recover damages as a matter of law)

D. Conclusion.

For the reasons set forth below, the department should maintain its original decision, to not award HL&PD any stranded cost recovery, either directly through stranded cost payments or indirectly through some ill-defined Òslice-of-the systemÓ forced transfer. The department should ensure that its decision is adequately supported by findings of fact and rulings of law to preclude further appellate delays. In no case should the department grant HL&PD any further stranded cost recovery beyond that which HL&PD has already enjoyed during the fourteen (14) years since HL&PD signed its last contract covered by this case, during the seven (7) years since StowÕs first vote to separate from HL&PD in 1993, and during the six (6) years since StowÕs second vote to separate from HL&PD in 1994.

II. ONE PRELIMINARY POINT: CHANGING THE DENOMINATION OF THE DISPUTE FROM A ÒSTRANDED COST RECOVERYÓ DISPUTE TO A ÒSLICE-OF-THE-SYSTEM FORCED TRANSFERÓ DISPUTE DOES NOT CHANGE THAT UNDERLYING ISSUES.

The department determined in D.P.U. 94-176 that HL&PD should recover no stranded costs from SMED. Stow Municipal Electric Department, D.P.U. 94-176, at 40-48, 105-106 (February 16, 1996). Since then, HL&PD has recovered four-and-one-half more yearsÕ worth of stranded costs from Stow. However, the reasons for the original department determination remain proper today. Specifically, the mere changing of the denomination of the dispute (from a Òstranded cost recoveryÓ dispute in 1995 to a Òslice-of-the-system forced transferÓ dispute in 2000) does not modify the merits of the dispute in any way. The departmentÕs generous 50/50 weighting of OCLD and RCNLD for the sale price for the tangible distribution plant located in Stow still stands. Stow Municipal Electric Department, D.P.U. 94-176, at 57-66 (February 16, 1996). The departmentÕs combined finding in 1996 (of no stranded cost recovery, combined with a generous 50/50 OCLD/RCNLD tangible plant price) was fair in 1996, and remains fair in 2000.[4] Nothing resulting from the changing of the denomination of the dispute alters this basic fact.

An example will make this point clear. Assume HL&PD has a contract price for power of 9¢/KWH, that the current market price is 5¢/KWH, and that HL&PDÕs stranded cost is thus 4¢/KWH (= 9¢/KWH - 5¢/KWH). It makes no economic difference to Stow or to Hudson whether the excess 4¢/KWH is paid by Stow to Hudson as a stranded cost payment or as an above-market contribution caused by an involuntary Òslice-of-the-system.Ó Both payments are wrong, for the reasons set forth by the department four years ago in D.P.U. 94-176 and for the reasons set forth by SMED in this brief and in all prior SMED briefs. A Òslice-of-the-systemÓ includes 100% of stranded costs,[(5)] and the change in the name from Òstranded cost recoveryÓ to Òinvoluntarily purchased slice-of-the-systemÓ changes nothing. Ex. RS-2, pp. 10-11 [Smith]; Tr. 1R:32-40 [Monteiro].

III. THE DEPARTMENT CAN NOT INCLUDE A ÒSLICE-OF-THE-SYSTEMÓ IN THE SALE AS A MATTER OF LAW.

A. HL&PD Has Not Demonstrated the Prudence Of The Underlying Stranded Costs.

The SJC has ruled that only prudently-incurred stranded costs may be recovered by utilities. Massachusetts Institute of Technology v. Department of Public Utilities, 425 Mass. 856, 858 n. 4 (1997). The SJCÕs MIT decision in fact uses the word ÒprudentÓ or ÒprudentlyÓ (or cognates of ÒprudentÓ) no fewer than 26 times. MIT, 425 Mass. 856, 858 n. 4, 864, 864 n. 19, 865, 865 n. 23, 866, 867, 872, 872 n. 38, 874, 875, 875 n. 43 (1977). The SJC further specifically ruled that the department should ensure that only prudently incurred costs are recovered in transition charges. MIT, 425 Mass. 856, 872, 872 n. 38 (1977). The SJC repeated these rulings in its decision in this case. Stow Municipal Electric Department v. Department of Public Utilities, 426 Mass. 341, 348, 349 (1997).

The United States Federal Energy Regulatory Commission (FERC) likewise only permits the recovery of prudently-incurred stranded costs. FERC Order 888, 61 Fed. Reg. 21,540, 21,664 (1996); these FERC stranded cost recovery rules are codified at 18 C.F.R. ¤35.26. FERCÕs prudence requirement is stated at 18 C.F.R. ¤35.26 (b)(1) and (b)(5). This FERC policy was cited with approval by the SJC in MIT (425 Mass. 856, 866 (1997)) and in Stow (426 Mass. 341, 348 (1997)).

HL&PD has offered no affirmative evidence of prudence. Instead, HL&PD has led the department into error by persuading the department to strike SMEDÕs affirmative evidentiary demonstration that HL&PDÕs stranded costs were, in large part, imprudently incurred (Ex. S-4, pp. 3-7 [Smith]) and by persuading the department to exclude HL&PDÕs imprudence as an issue from this case. Hearing Officer Ruling, D.P.U. 94-176, dated August 10, 1995. Indeed, HL&PD appears to have lost or misplaced the generation planning studies it claims it performed to justify the execution of the PSAs and PPAs, and the other generation acquisition decisions, which are under discussion in this case.

HL&PD has thus created a situation in which the department is legally precluded from granting HL&PD recovery of its imprudently-incurred stranded costs. The department is barred from now making a finding of prudence, because the affirmative evidence of imprudence has been stricken. Hearing Officer Ruling, D.P.U. 94-176, dated August 10, 1995. The department is barred from granting HL&PD recovery because it cannot make the required finding of prudence. MIT, 425 Mass. 856, 858 n. 4, 872, 872 n. 38 (1997); Stow, 426 Mass. 341, 348, 349 (1997).[(6)]

B. HL&PD Has Not Demonstrated The Reasonability Of

The Underlying Stranded Costs.

Completely separately from the requirement of a demonstration of prudence (a before-the-fact concept), utilities in Massachusetts have to demonstrate that their stranded costs are reasonable in amount (an after-the-fact concept) in order to obtain their recovery in transition charges. MIT, 425 Mass. 856, 872, 872 n. 38 (1997); Stow, 426 Mass. 341, 349 (1997).[7]

HL&PD has introduced no evidence of the reasonability of HL&PDÕs stranded costs. However, it is plain that HL&PDÕs stranded costs are in fact grotesquely large, and therefore unreasonable. HL&PD now claims $18.8 million (NPV) in 2000 for StowÕs share of HL&PDÕs stranded costs (Ex. RH-4, attachment page 3 of 3) and $128 million (NPV) for HL&PDÕs stranded costs in total (Tr. 1R:28-29 [Monteiro]). This compares to HL&PDÕs $14.9 million estimate for StowÕs share five years ago, in 1995 (Tr. 1R:27 [Monteiro]; Ex. H-5, p. 19 [Reed]; Ex. H-5, Attachment 3, Table A [Reed]).

Unhappy with their original stranded cost estimates ($128M system-wide stranded costs in 2000 and $18.8M for StowÕs share in 2000 (Tr. 1R:28-29 [Monteiro]; Ex. RH-4, attachment page 3 of 3)), HL&PD reversed its course, and offered three reasons why HL&PDÕs current stranded cost estimate might be too high. Tr. 3R:192-195 [Monteiro]. HL&PD conducted three Òsensitivity tests,Ó which included changing MMWECÕs market price estimates (Tr. 3R:192-194 [Monteiro]), the discount rate (Tr. 3R:194 [Monteiro]), and the O&M escalator (Tr. 3R:194-195 [Monteiro]). Of course, moving input values in certain directions will affect the output values; Mr. Monteiro did not perform any symmetrical sensitivity testing on HL&PDÕs stranded cost estimate involving moving MMWECÕs market cost estimate, the discount rate, or the O&M escalation rate in the opposite directions. Furthermore, there are clear indications on the record that HL&PDÕs stranded cost estimates have biases on the low side built into them. For example (Ex. RH-4, attachment page 2 of 3), HL&PD omitted all depreciation expense for HL&PDÕs Seabrook direct share from its stranded cost estimate.

Stranded costs should shrink over time as they are paid down. Tr. 1R:27 [Monteiro]. The fact that Stow has paid down these costs for five years, 1995-2000, when combined with the fact that HL&PDÕs stranded cost estimate has now grown from $14.9 million in 1995 to $18.8 million in 2000, provides one measure of the unreasonability of HL&PDÕs stranded costs.[8]

A second measure of the unreasonability of the magnitude of HL&PDÕs stranded costs can be obtained by comparing them to BECoÕs. BECo as a utility system is roughly 42 times as large as HL&PD, measured by KWH of retail load. Tr. 3R:292-293 [Smith]. However, BECoÕs stranded costs, approved by the department in a settlement, were only about $850 million[(9)] (NPV), or only about 7 times HL&PDÕs stranded cost estimate of $128 million (NPV). Tr. 3R: 292-293 [Smith]. It is hard to imagine how HL&PD can have one-seventh (1/7) of the stranded costs of a system (BECo), when it is only one-forty-second (1/42) as large as BECo.

A third measure of the unreasonability of the magnitude of HL&PDÕs stranded costs can be derived by comparing them to HL&PDÕs annual gross revenues. HL&PDÕs annual gross revenues are approximately $27 million. Tr. 1R:29 [Monteiro]. HL&PDÕs $128 million stranded cost estimate is roughly five times HL&PDÕs gross annual revenues ($128/$27 = 4.74)(Tr. 1R:29 [Monteiro]).

A fourth measure of unreasonability of the magnitude of HL&PDÕs stranded costs is to put them on a per KWH basis. Fourteen years after HL&PD made its last long-term commitment to serve Stow, in 1986, HL&PDÕs remaining stranded costs are still 4.6¢/KWH in 1999 alone, with many more years to go before they are finally collected in full. Tr. 1R:31-32 [Monteiro].

On this record, HL&PDÕs stranded costs are clearly unreasonably large in size. The department can not authorize their collection by any mechanism on the current record. MIT, 425 Mass. 856, 872, 872 n. 38 (1977); Stow, 426 Mass. 341, 349 (1977).[(10)]

C. HL&PD Has Not Demonstrated That The Stranded

Costs Result from Restructuring.

The department does not act as an insurer of any utilityÕs sales or revenues. Ratepayers also do not issue guarantees to utilities in the ordinary course as to future sales or as to future revenues. The SJC has ruled that stranded costs can be collected in transition charges only if they are stranded by restructuring, not by other events unrelated to restructuring. MIT, 425 Mass. 856, 858 n. 4 (1997); Stow, 426 Mass. 341, 348 (1977). FERC similarly requires that the costs be stranded by reason of regulatory restructuring in order to qualify for stranded cost recovery. FERC 888-A, at p. 30,378; Alma, Michigan, 88 FERC |63,002, at p. 65,020, n. 12 (ALJ Dowd decision dated July 16, 1999)(Ex. DTE-2).

Here, for once, there is rare unanimity among the witnesses in the evidentiary record. All three witnesses who testified on this subject agreed that StowÕs exit from the HL&PD system did not result from restructuring, and that StowÕs exit predated restructuring. Ex. RS-2, pp. 2-3 [Smith]; Tr. 1R:46-47 [Monteiro]; Ex. H-5, p. 7 [Reed]. Stow has always had the right pursuant to St. 1898, c. 143 to sever its relationship with Hudson and to purchase from anyone else. Therefore, the resulting costs to HL&PD lack the required element for recovery of stranded costs that they must be stranded due to restructuring.

HL&PD has not proven, and can not prove, that the costs in question are stranded costs, i.e., that they were stranded due to restructuring. HL&PD can not prove this because all witnesses agree that the opposite is the case, and that StowÕs exit from HL&PD relies upon a statute (St. 1898, c. 143) that pre-dates restructuring by some 97 years (1898 is some 97 years before the DPU 1995 notice of inquiry initiating D.P.U. 95-30) and predates restructuring. Ex. RS-2, pp. 2-3 [Smith].

As a matter of law, the costs discussed in this case are not stranded costs. MIT, 425 Mass. 856, 858 n. 4 (1997); Stow, 426 Mass. 341, 348 (1997). FERC 888-A, at p. 30,378; Alma, Michigan, 88 FERC |63,002, at p. 65,020, n. 12. These costs are, in FERCÕs terminology, Òuneconomic costsÓ which are not Òstranded costs.Ó As a matter of law, they therefore can not be recovered from Stow by any mechanism.

D. The Department Can Not Approve HL&PDÕs ÒSlice-Of-The-SystemÓ Proposal Because It Would Violate The Statute By Including Property In The Sale Other Than Tangible Utility Plant And Property Physically Located In Stow.

HLPDÕs Òslice-of-the-systemÓ proposal includes intangible property (PSAs and PPAs) related to tangible property outside of Stow, and also includes tangible utility plant and property outside of Stow. Ex. RH-11; Ex. RH-2; Tr. 1R:45 [Monteiro]. St. 1898, c. 143, ¤2 limits the determination of property that may be included in the sale to Òthe plant and property of the town of Hudson established within the limits of the town of Stow.Ó Accordingly, it is beyond the departmentÕs authority to order Stow to accept any ÒsliceÓ of HL&PDÕs system.[(11)] Because this point was recently argued by SMED (SMEDÕs April 18, 2000 Memorandum of Law in Support of Motion for Summary Disposition, at pp. 20-24), SMED will not burden the record further on this issue.

E. The Department Can Not Approve HL&PDÕs ÒSlice-Of-The-SystemÓ Proposal Because It Would Violate Statutory Proscriptions Against The Awarding Of Consequential Damages.

St. 1898, c. 143, ¤2, G.L. c. 164, ¤¤42 and 43, and the Municipal Ownership Law (St. 1891, c. 370, ¤12) preclude the awarding of consequential damages as a part of this transaction, either directly as an element of monetary damages or indirectly through

HL&PDÕs ÒsliceÓ proposal.[12] Because this point was recently argued by SMED (SMEDÕs April 18, 2000 Memorandum of Law in Support of Motion for Summary Disposition, at pp. 20-24), SMED will not burden the record further on this issue.

F. HL&PDÕs ÒSlice-Of-The-SystemÓ Proposal Violates The Law Because It Includes No Mitigation By HL&PD, But Does Include ÒReverse Mitigation.Ó

Stranded costs are supposed to be collected only if they have been mitigated. See 220 C.M.R. 11.03(3); G.L. c. 164, ¤1G(d). HL&PDÕs efforts at mitigation appear to be largely or exclusively limited to actions taken by MMWEC.[13] Ex. RH-6.

However, HL&PD on its own or in conjunction with MMWEC has taken certain actions that can be fairly described as constituting Òrevere mitigation.Ó Suspecting that SMED will shortly be free of HL&PDÕs clutches, HL&PD has charged rates that are higher than necessary in order to accelerate StowÕs cash payments to HL&PD, and has taken cash (generated in part by Stow ratepayers) out of the system entirely. Three of HL&PDÕs actions clearly constitute Òreverse mitigationÓ over the last few years.

First, although HL&PD and MMWEC together improperly refused to disclose the details (see HL&PDÕs responses to IRs SMED-1-18 and SMED-1-19), it is clear from the responses that HL&PD did make that MMWEC and HL&PD have accelerated debt service payments in the recent past. See also Tr. 1R:48 [Monteiro]. This had the effect of increasing costs to ratepayers in the short run. This acceleration thus constituted Òreverse mitigationÓ for parties like SMED who will be long gone by the time the counter balancing future debt service reductions will be enjoyed.

Second, HL&PD has accelerated book and rate depreciation on its nuclear plant investments. Although Mr. Monteiro attempted to leave the impression that HL&PDÕs nuclear plant investments were being depreciated of rates of 3%/year (gross) and 10.49%/year (net) (Tr. 1R:49, 3R:200 [Monteiro], it was established that HL&PDÕs depreciation rate on its nuclear plant was over 6%/year (gross) (Tr. 3R:202-203

[Monteiro]). At this rate, Seabrook will be fully depreciated in 9 more years, i.e., by 2009. Tr. 1R:49-50 [Monteiro]. This is much less than SeabrookÕs projected useful service life, for example, as Seabrook only entered into commercial operation in 1990 (Tr. 1R:50 [Monteiro]) and as Seabrook has a 40-year operating license from the NRC (Tr. 3R:232 [Monteiro]). By accelerating the book and rate depreciation on Seabrook, HL&PD has again increased SeabrookÕs cost to ratepayers in the short run. This is again an example of Òreverse mitigationÓ for ratepayers (like SMED) that will not be around to enjoy the offsetting benefits of reduced depreciation expense in the distant future of this accelerated book and rate depreciation.

Third, HL&PD has taken some of the cash surpluses it has generated, by charging rates that are above current costs, and segregated that cash in funds outside of HL&PD and beyond the departmentÕs reach. Ex. RS-1. By putting cash beyond the departmentÕs reach, HL&PD has ensured that the DTE can not effect a fair separation of Stow from HL&PD. HL&PD has also assured itself that Hudson citizens can enjoy in the future all, or at least a disproportionate share, of the benefits of HL&PDÕs Òreverse mitigationÓ actions in the past.

HL&PD can not demonstrate any tangible benefits of its mitigation attempts in the past, and indeed largely points (Ex. RH-6) to MMWECÕs, not HL&PDÕs, mitigation attempts. However, SMED has pointed out three Òreverse mitigationÓ actions that were taken by HL&PD and/or MMWEC (acceleration of debt service payments, acceleration of depreciation expense, and transfer of HL&PD cash into a trust fund that is outside of HL&PDÕs balance sheet and beyond DTE jurisdiction) that have the combined effect of cheating Stow.

No recovery of stranded costs, whether directly in payments or indirectly in a Òslice,Ó is legal or permissible in a case where intentional Òreverse mitigationÓ steps have been taken.

G. HL&PD Has Never Defined What A ÒSlice-Of-The-SystemÓ Means. ___

Although HL&PDÕs Òslice-of-the-systemÓ concept drew fleeting attention in the S.J.C. appeal (Stow, 426 Mass. 341, 350 (1997)), it is nevertheless the fact that no adequately specified Òslice-of-the-systemÓ proposal exists anywhere in the record, either in the 1995 hearings (D.P.U. 94-176) or in the 2000 hearings (D.T.E. 94-176-C). In essence, and analogizing to Mass.R.Civ.P. 12(b)(6), HL&PD has failed to state a claim upon which relief can be granted.

A review of the direct case presented by HL&PD in the 1995 hearings (D.P.U. 94-176) reveals that Mr. Reed filed no exhibits of any kind specifying any Òslice.Ó Ex. H-5, passim. Mr. ReedÕs prose testimony did contain two isolated sentences, one in the initial testimony (Ex. H-5, p. 10 [Reed]), and one in his rebuttal testimony (Ex. H-6, p. 6 [Reed]), which loosely referred to the ÒsliceÓ concept. Neither sentence contained any specifying detail whatsoever.

A review of HL&PDÕs direct case presented in the 2000 hearings (D.T.E. 94-176-C) reveals a similar outcome. The DTE staff happened to ask HL&PD an information request on

this topic,[(14)] IR DTE-H-1-15, which became Ex. RH-11. Ex. RH-11 leaves out a multitude of required details, some of which were supplied by HL&PD when asked on cross-examination, and some of which remain unanswered today. Examples of required details, absent from Ex. RH-11, include but are not limited to:

(1) How is the percentage that determines that ÒwidthÓ of the ÒsliceÓ in each year to be determined?

(2) If the ÒwidthÓ of the slice is based on energy, is that measured before or after losses?

(3) If the ÒwidthÓ of the slice is based on load, is that measured by StowÕs non-coincident peak (NCP) load, or by StowÕs contribution to the Stow plus Hudson coincident peak (CP) load?

(4) How are the other towns served by HL&PD to be counted? Are their energy or loads to be in the numerator, or the denominator, or both?

(5) Who bids the Cherry Street units into the ISO?

(6) What is the duration in years of the ÒsliceÓ for each unit?

(7) Are routine capital additions, rebuilding of entire units due to catastrophic losses, repowerings, or life extensions of units included?

(8) Who votes HL&PDÕs ownership shares in units covered by joint ownership agreements?

(9) How are extensions (by refinancing) to bond terms by MMWEC, if any, handled?

(10) How are disputes about billing handled?

(11) How are excess KWHs in ÒvalleyÓ load times for Stow handled?

(12) Who makes dispatch decisions, say for Cherry Street?

(13) Who makes retirement decisions, say for Cherry Street?

(14) What adjustments, if any, are made for the fact that HudsonÕs and StowÕs load shapes differ?

HL&PDÕs casual dismissal of necessary details, demonstrated by HL&PDÕs extremely vague ÒsliceÓ proposal (Ex. RH-11), contrasts oddly with HL&PDÕs extremely aggressive claims in this case, to the effect that SMED should pay for HL&PDÕs stranded costs, regardless of prudence, reasonability, causation by restructuring, statutory prohibitions, and the duration of the recovery period into the indefinite future, in a forced ÒsliceÓ transfer.

HL&PD has failed to state any type of relief in this case with adequate specificity which would permit the DTE to grant such relief. FERC has rejected true-up mechanisms, which are far less vague and indeterminate than HL&PDÕs ÒsliceÓ proposal, because true-up mechanisms are vague and indeterminate compared to stranded cost recovery. 18 C.F.R. ¤35.26. No department tailoring or Òfilling in the blanksÓ of HL&PDÕs unspecified ÒsliceÓ proposal is either appropriate, or even possible, on this record.

H. HL&PD Can Not Recover Under FERCÕs Alma, Michigan Ruling.

The SJC cited with approval FERCÕs policy on stranded cost recovery, and specifically cited FERCÕs decision in Alma, Michigan with approval. Stow, 426 Mass. 341, 348, 351 (1997). Subsequent proceedings in the Alma case demonstrate that HL&PD can not

recover stranded cost damages in this case. The ALJÕs July 16, 1999 decision in Alma (88 FERC |63,002)(Ex. DTE-2) precluded Consumers Energy Company (CECo) from recovering any stranded costs after ten (10) years had elapsed after CECo made its commitment to incur long-term capital costs to serve Alma. Ex. DTE-2, pp. 65,018 (beginning date of Òreasonable expectation periodÓ), 65,019 (ending date of Òreasonable expectation periodÓ).

Here, HL&PD made its last commitment to incur long-term capital costs to serve Stow in 1986. Ex. RH-2; Tr. 1R:45-46 [Monteiro]. Ten years from 1986 is, non-controversially, 1996. Tr. 1R:46 [Monteiro]. Accordingly, under the FERC ALJÕs Alma decision, Stow has already paid for its full share of all of HL&PDÕs stranded costs for fourteen (14) years since the date of HL&PDÕs last commitment to incur long-term capital costs to serve Stow, four (4) years more than the maximum time period deemed reasonable in Alma. Accordingly, no further recovery of HL&PDÕs costs is permitted as a matter of law.

HL&PD can not argue that the 20-year reasonable expectation period applied by FERC in FERCÕs Las Cruces, New Mexico decision (87 FERC |61,201 (May 26, 1999))(Ex. RH-21) also applies here. There was extensive record evidence of 20-year generation planning studies and there was reliance upon these 20-year generation planning studies by FERC in Las Cruces. Ex. RH-21, p. 9 of 25. HL&PD has offered no evidence of ever using a 20-year (or more) generation planning horizon in this case. Ex. RH-3. What little evidence there is in the record of HL&PD conducting any generation planning studies at all would seem to indicate the use of a 10-year generation planning horizon by HL&PD. Ex. RH-3. Accordingly, FERCÕs decision in Las Cruces to employ a 20-year reasonable expectation period is inapplicable here, and the 10-year reasonable expectation period of Alma remains the correct period.

I. HL&PDÕs ÒSlice-Of-The-SystemÓ Proposal Violates The Statute That Terminates HL&PDÕs Rights To Sell Electricity In the Town of Stow.

HL&PDÕs ÒsliceÓ proposal could have HL&PD selling electricity to SMED through 2019 at least and possibly for much longer. Exs. RH-11 and RH-2. For example, the Seabrook contract is a 99-year contract (Ex. RH-1). Seabrook has a forty-year operating license (Tr. 3R:232-233 [Monteiro]). Further, the Seabrook joint ownership agreement

permits indefinite life extensions (Ex. RH-1) that neither HL&PD nor SMED could veto (Tr. 3R:234 [Monteiro]).

Thus HL&PDÕs ÒsliceÓ proposal runs for a minimum of 19 years (2000-2019), but in fact could run to 2026 (Ex. RH-2), 2030 (based on a 1990 Seabrook in-service-date and a 40-year Seabrook operating license) or much longer (based upon life extension, if any).

By comparison, St. 1898, c. 143, ¤2, provides in pertinent part that, after the sale of HL&PDÕs tangible utility property physically located in Stow:

... and after such purchase the right

of the town of Hudson to distribute and

sell gas or electricity within the limits

of the town of Stow shall cease.

Far from providing for the clean and sharp separation envisioned by St. 1898, c. 143, ¤2, HL&PDÕs ÒsliceÓ proposal violates the law by providing for an open-ended, almost permanent continuing sale arrangement.

J. HL&PDÕs ÒSlice-Of-The-SystemÓ Proposal Violates The Statute That Requires A Determined Purchase Price.

Under HL&PDÕs ÒsliceÓ proposal, the final amount paid by SMED to HL&PD will not be determined until 2019 at the earliest, and might extend for several decades past that

date. This is true because the amounts purchased in each year would depend in part upon future Stow and Hudson loads (Ex. RH-11). This is also true because the price paid for the power from each unit would depend in part upon a future yearÕs contract price, not yet determined (Exs. RH-11, RH-1, and RH-13).

This open-ended price term violates G.L. c. 164, ¤43, |1, which requires the department to determine a specific price before the sale is finalized. The department cannot, as a matter of law, fulfill its duties to determine a specific pre-transaction price as required by G.L. c. 164, ¤43, |1, if it approves HL&PDÕs ÒsliceÓ proposal.

K. HL&PDÕs ÒSlice-Of-The-SystemÓ Proposal Violates The Statute That Requires A Specified Determination Of The Included Plant and Property.

St. 1898, c. 143, ¤2 requires that a Òschedule of said property and plant located within the limits of the town of StowÓ shall be filed by HL&PD with the Stow town clerk as part of the sale. Putting aside the problem that HL&PDÕs slice includes property and plant not located in Stow, there is nevertheless another statutory violation related to HL&PDÕs proposed Òslice.Ó HL&PD cannot specify today what is in the Òslice.Ó HL&PD cannot specify what tangible property is in the ÒsliceÓ because the tangible property can change over time. For example, the Seabrook plant could be expanded, rebuilt, or repowered without either HL&PDÕs or SMEDÕs permission 10 or 20 years in the future (Ex. RH-1); that new future plant and property (located in Seabrook, N.H.) could hardly be specified in a ÒscheduleÓ filed in 2000 or 2001 by HL&PD with the Stow town clerk, as is required by St. 1898, c. 143, ¤2. Similarly, even the percentages of the contracts (PPAs and PSAs) can not be specified now, under HL&PDÕs ÒsliceÓ proposal. Ex. RH-11.

Similarly, HL&PDÕs ÒsliceÓ could hardly be conveyed to SMED by a deed, as is required by G.L. c. 164, ¤43, |2, due to the extraordinary complications contemplated in the transaction by HL&PD. Section 43, |2 specifically requires that the selling town Ò... shall tender a good and sufficient deed of conveyance ...Ó to the buying town. With respect to HL&PDÕs proposed Òslice,Ó however, the changing percentage shares by

year, based upon future load data, the details of how town contribution to total (Hudson plus Stow plus other towns) peak is calculated, and the details of payment obligations and contractual rights could hardly be contained in a deed.

Accordingly, HL&PDÕs ÒsliceÓ proposal violates both the ÒscheduleÓ requirement of St. 1898, c. 143, ¤2 and the ÒdeedÓ requirement of G.L. c. 164, ¤43, |2.

IV. THE DEPARTMENT SHOULD NOT INCLUDE A ÒSLICE-OF-THE- SYSTEMÓ IN THE SALE AS A MATTER OF SOUND PUBLIC POLICY.

A. All Legal Objections To the ÒSlice-Of-The-SystemÓ Also Constitute Public Policy Reasons Against Inclusion In The Sale. __

SMED has set forth, in ¤III, above, eleven reasons why the DTE can not, as a matter of law, include any ÒsliceÓ in the sale. All eleven of these reasons also constitute public policy considerations against including any ÒsliceÓ in the sale, as should be obvious. Specifically, each of these legal objections also constitutes a public policy objection, as further described below.

1. Imprudence. It is bad public policy to include imprudent investments in stranded cost recoveries, whether directly through stranded cost payments or indirectly through a Òslice.Ó It would be completely unfair to burden Stow with the results of the imprudent decisions made by HL&PDÕs commissioners in buying as much Seabrook as they did in order to serve one large industrial customer in Hudson.

2. Unreasonability. It is bad public policy to include unreasonably large stranded costs in any cost recovery scheme paid for by departing customers, whether directly through stranded cost payments or indirectly through a Òslice.Ó HL&PDÕs before-the-fact imprudence resulted, not surprisingly, in after-the-fact costs that are unreasonable by any measure. It would be unfair to assess these unreasonable costs to Stow.

3. Costs Stranded For Reasons Unrelated To Restructuring. It is bad public policy to include costs which were stranded for reasons unrelated to restructuring, like the costs in issue in this case, in any type of stranded cost recovery mechanism.

4. Generation Plant Outside Of Stow. It is bad public policy to modify the statutory scheme contained in St. 1898, c. 143, which only contemplated the purchase by Stow from HL&PD of tangible utility plant located in Stow, and to radically restructure the sale to include a ÒsliceÓ that has never been contemplated by the statutory scheme since 1898.

5. Consequential Damages. It is bad public policy to modify the statutory scheme contained in St. 1898, c. 143, which precluded the inclusion of consequential damages (which would therefore also include a preclusion of stranded costs, which are merely one type of consequential damages), and to radically restructure the sale to include compensation for consequential damages.

6. Mitigation. It is bad public policy to force Stow to buy assets which have not benefited from mitigation efforts, but for which the underlying costs have in fact been Òreverse mitigatedÓ by accelerating depreciation, by acceleration of bond payment terms, by making bond lives shorter than asset useful service lives, and by removing cash from HL&PD and putting it in a trust fund outside the reach of the DTE.

7. Lack Of Definition. No concrete proposal, specific enough to be actually implemented, has ever been submitted by HL&PD to the DTE. It would be bad public policy for the

DTE to either Òfill in the blanksÓ for a vague and non-specific proposal, or to order SMED to buy something that is not defined.

8. Alma Ruling/Reasonable Expectation Period. It is bad public policy for the DTE to go beyond the Alma rule, which permitted recovery for 10 years past the last commitment date; here, we are 14 years past the last commitment date (1986), and all legitimate public policy concerns about stranded cost recovery have thus already been more than completely satisfied.

9. Right To Sell In Stow. It is bad public policy to violate the statutory requirement (St. 1898, c. 143, ¤2) of a clean break between the two systems, and to violate StowÕs right to have HL&PDÕs rights to sell in Stow terminate as of the sale date.

10. Right To A Determined Purchase Price. It is bad public policy to violate SMEDÕs statutory right to a specified, determined purchase price (G.L. c. 164, ¤43, |1), and to order SMED to buy an undetermined ÒsliceÓ (in size in KWs and in size in KWHs and in duration in years) that will not have a determined price for 20, 30 or 40 years or more.

11. Right To Determination Of Included Property. It is bad public policy to violate SMEDÕs statutory right (St. 1898, c. 143, ¤2) to a specific and detailed listing of the property included in the sale, appropriate for inclusion in a deed. Any ÒsliceÓ is so vague and so indeterminate as to preclude a specification in a deed.

B. Competition.

The DTE has labored hard over the past decade to increase competition in the electric utility industry in Massachusetts. Enormous progress has been made in managing the transition from price regulation of generation to deregulation and competition. In the long

run, all citizens of Massachusetts, and all residential, commercial, and industrial electric customers of utilities, stand to benefit from this shift to competition.

Allowing HL&PD to force a ÒsliceÓ onto Stow would preclude competition, and would destroy SMEDÕs ability to operate as an independent entity. HL&PDÕs ÒsliceÓ proposal, which would force SMED to accept a large percentage of HL&PDÕs most expensive and imprudent wholesale purchases at an unreasonable contract price, would force above-current-market cost and above-value electricity onto SMED. When combined with the above-cost (50/50 OCLD/RCNLD) distribution plant sale, this would have the effect of pushing onto SMED total costs that are still higher than todayÕs share of costs borne by Stow. Thus HL&PDÕs ÒsliceÓ would make Stow worse off than it is today, and would preclude Stow from going forward with municipalization and from enjoying the benefits of entering the competitive market place.

HL&PDÕs ÒsliceÓ proposal is bad public policy because it is clearly designed to defeat SMEDÕs municipalization, to deny the benefits of competition to Stow, and to keep Stow a captive customer of a grotesquely high-cost system indefinitely.

C. Cost Control.

HL&PDÕs ÒsliceÓ proposal is bad public policy because it shields the party that controlled the cost-incurring process (HL&PD) from the disastrous effects of its bad decision-making, while it punishes the party that did not control the cost-incurring process (Stow) by making Stow pay for those inflated costs as long as they exist. Stow voters donÕt vote at Hudson town meeting, and Stow voters donÕt vote for HL&PD board members. TR. 1R:68 [Monteiro]. HL&PD and HudsonÕs voters had total control, and Stow and StowÕs voters and residents had no control, over the cost-incurrence process. It is good public policy to assess costs on those who control them, and it is poor public policy to assess costs on those who do not control them. Accordingly, HL&PDÕs ÒsliceÓ proposal constitutes poor public policy because it ignores the principle of making those who control costs be the same ones who bear the burden of those costs.

D. Cost Causation.

HL&PDÕs ÒsliceÓ proposal is bad public policy because it puts costs onto the party that did not cause them, and its shifts costs away from the party that did cause them. Although HL&PDÕs utter lack of generation planning during the relevant time period makes it somewhat difficult to understand what HL&PD was trying to accomplish, it appears that, at least in part, HL&PD was purchasing base load nuclear power in order to serve growing industrial load in Hudson. Ex. S-4, p. 7 [Smith]. If HL&PDÕs generation planning process (if any) considered this issue at all, it would appear that HL&PD went on its bizarre buying spree for reasons related to Hudson industrial load, not Stow.[(15)]

As it is good public policy to assess costs upon those who cause them, and not upon those who do not cause them, HL&PDÕs ÒsliceÓ proposal is bad public policy because it ignores this principle of assessing costs upon those who cause them.

E. Consistency With Distribution Plant Sale.

HL&PDÕs ÒsliceÓ proposal constitutes bad public policy because it is inconsistent with the departmentÕs previous ruling on the sale price for the HL&PD distribution plant in Stow. The department ruled that HL&PDÕs distribution plant in Stow would be sold at a price reflecting a 50/50 weighting of OCLD and RCNLD. Stow Municipal Electric Department, D.P.U. 94-176, pp. 57-66 (February 16, 1996). This produces a purchase price above cost (OCLD), presumably to reflect value considerations. However, in the generation portfolio area, where HL&PDÕs contract cost grossly exceeds value (current market price or cost), HL&PDÕs ÒsliceÓ proposes that the generation plant and portfolio transfer occur precisely at contract cost. In other words, where value exceeds cost, in the distribution plant situation, the department has taken value into account to order an above-cost price. Where value is less than cost, in the generation plant situation, HL&PDÕs ÒsliceÓ proposal would force SMED to pay exactly the contract price (cost) to HL&PD. This mixing-and-matching of an above-cost result (for distribution plant) with a cost result (for the generation plant and portfolio) produces a combination that has no economic or regulatory justification.

Cost may be appropriate, or value may be appropriate, but the department can not justify a sale at above-cost where cost is below value (distribution plant) combined with a sale at cost where cost is above value (generation plant and portfolio). HL&PDÕs ÒsliceÓ proposal constitutes bad public policy because it combines inconsistent results in the cost-versus-value decision.

F. Indeterminancy.

It is poor public policy to order a sale where the item being sold, and the price at which the sale is to occur, will not be determined for 20 years or more. No one knows today the number of KWs, or the number of KWHs, that are to be sold by HL&PD to SMED in any year of HL&PDÕs ÒsliceÓ proposal. Ex. RH-11. No one knows today the price in $/KW or in ¢/KWH of any of the individual unitsÕ output in any years of the Òslice,Ó or the total cost in any year, or the total cost for all years combined. Ex. RH-11. No one knows today the duration of the ÒsliceÓ for most of the units. Ex. RH-11; Ex. RH-1.

The department would be exercising poor public policy to force SMED to buy something that can not be specified in size or duration at a price that cannot be specified.

G. Workability.

HL&PD has not provided a simple example, anywhere in the U.S. or elsewhere, at any point in history, where a ÒsliceÓ anything like HL&PDÕs proposal has been forced upon an exiting customer. Certainly SMED knows of no such example. This is not surprising. HL&PDÕs ÒsliceÓ proposal is almost certainly unmanageable and unworkable. If forced to buy HL&PDÕs Òslice,Ó SMED would have to purchase additional electricity in many hours but in unknown amount (because SMED could not manage the ÒsliceÓ output, but would have to passively accept the after-the-fact outcomes of HL&PDÕs management of

the ÒsliceÓ). SMED would also have to sell excess electricity in some hours, again in unknown amounts, for the same reason. SMED would have no control over the Òslice,Ó for example, in scheduling outages or in bidding units into ISO. SMED, a very small municipal light department, would have a horrendously difficult power supply management problem on its hands if the ÒsliceÓ were forced onto SMED. Similarly, the simple and attractive all-requirements contract SMED had originally negotiated would (at best) be smaller in size and savings and would (at worst) be impossible to negotiate or manage in conjunction with a forced ÒsliceÓ because it would be only for power above the always unknown and forever indeterminate Òslice.Ó

It is poor public policy to order an apparently unworkable ÒsliceÓ upon SMED, when no record evidence would support the conclusion that any similar ÒsliceÓ had ever been ordered by any PUC anywhere in the United States before.

H. Trust Fund.

HL&PD has taken retained earnings out of the HL&PD balance sheet, has alienated them from HL&PD, and has segregated them in a trust fund (Ex. RS-1) that is outside of HL&PD and utterly beyond the departmentÕs control. Although HL&PD initially claimed that SMED would automatically get its share of the benefits of these alienated assets (HL&PD response to IR-SMED-1-27, attached to Ex. RS-2), this is not true. HL&PDÕs board, acting as trustees of the trust fund, would be perfectly within their rights to use the trust fund money exclusively to offset future short term wholesale purchase, thus benefiting Hudson exclusively and Stow not at all. Ex. RS-1, Article III ÒPurpose and Termination;Ó[(16)] Tr. 3R:205-206 [Monteiro].

It would be poor public policy indeed to permit HL&PD to bleed off retained earnings, caused by past over-charges to Hudson and Stow ratepayers alike, and then to permit Hudson to obtain all the benefits of these past overcharges and these alienated retained earnings, while giving Stow none of the corresponding future benefits, and while forcing the improper ÒsliceÓ onto SMED at the same time.

I. Cost Results.

Shifting dollars of stranded costs from HL&PD (where they belong, according to the department in 1996) to Stow will have a disproportionate effect on Stow when measured in ¢/KWH terms, due to StowÕs smaller size in energy sales than Hudson. Dollars of stranded costs improperly shifted from HL&PD to Stow would have roughly eight times the ¢/KWH impact (increasing StowÕs rates) than they would have in ¢/KWH impact on Hudson (decreasing HudsonÕs rates). This is because Stow is roughly one-eighth HudsonÕs size in terms of energy sales. Ex. RH-12. Because improperly shifting dollars of stranded costs away from Hudson (where they belong, according to the department in 1996) to Stow (where they donÕt belong) has an eight times larger effect in ¢/KWH for Stow ratepayers than for Hudson ratepayers, shifting these dollars from Hudson to Stow constitutes poor public policy.

J. No Stranded Plant And No Stranded MWs of Capacity Exist.

As the department properly concluded four years ago, there is not one MW of stranded capacity, and not one dollarÕs worth of stranded plant, in the case of HL&PD without Stow. Stow Municipal Electric Department, D.P.U. 94-176, p. 46 (February 16, 1996). HL&PD will have to buy more KWs and KWHs than those provided by its portfolio of long-term generation assets whether Stow stays or Stow leaves. Id. At most, HL&PD has above-market costs (unrelated to restructuring) which will have to be spread over slightly fewer KWHs. HL&PD has neither stranded MWs of capacity nor stranded balance sheet dollars of stranded plant. Id.

Given the lack of stranded MWs of capacity and given the lack of stranded balance sheet dollars of stranded plant, it would be poor public policy to award any ÒsliceÓ to HL&PD, and to force SMED to accept any such Òslice.Ó

K. Other Public Interest Factors Previously Determined By the Department.

The department in its previous decision cited numerous public interest factors which weighed determinatively against awarding HL&PD any stranded cost recovery whatsoever. Stow Municipal Electric Department, D.P.U. 94-176, pp. 39-48 (February 16, 1996). Because ordering that HL&PDÕs ÒsliceÓ be forced onto SMED is logically equivalent to awarding 100% (or more) of stranded cost recovery (Ex. RS-2, pp. 10-11 [Smith]), these same public interest factors weigh identically against ordering a ÒsliceÓ to be included in the sale. Everything the department said four years ago on this topic remains correct today, with the one exception that Stow has improperly paid for its full share of stranded costs for the intervening 4 1/2 years since February 16, 1996. Just as it was poor public policy in 1996 to directly award HL&PD one penny of stranded costs, it is poor public policy in 2000 to indirectly award HL&PD one penny of stranded cost recovery through an involuntary Òslice.Ó Stow Municipal Electric Department, D.P.U. 94-176, pp. 39-48 (February 16, 1996). As nothing has changed in the last 4 1/2 years, and as there are no new facts before the department now, the department cannot credibly reverse its public interest determination of 4 1/2 years ago.

V. RESPONSES TO THE HEARING OFFICERÕS FIVE BRIEFING QUESTIONS.

The Hearing Officer circulated five briefing questions to the parties on August 21, 2000. The five questions, and SMEDÕs answer to each question, are set forth in this section of SMEDÕs brief.

Q1: Identify the public interest factors the Department should consider when determining whether a portion of Hudson Light & Power DepartmentÕs (ÒHudsonÓ) power supply portfolio Òought in the public interest to be included in the purchaseÓ of property by the Town of Stow (ÒStowÓ) from Hudson. Based on the public interest factors identified, should the Department determine that a portion of HudsonÕs power supply ought to be included in the sale pursuant to G.L. c. 164, ¤43?

A1: SMED has identified in ¤IV, above, the public interest factors which the department should consider when determining whether a portion of HL&PDÕs power supply portfolio should be forced upon SMED by including it in the sale. For the reasons stated in ¤IV, the public interest would be disserved by including any portion of HL&PDÕs power supply portfolio in the sale, and the public interest would be well served by permitting SMED to operate without these improper and illegal burdens. SMED additionally points out that, for the reasons set forth in ¤III, above, any such forced transfer is beyond the departmentÕs authority and otherwise not in compliance with the law.

Q2: Identify and discuss the benefits and disadvantages to both the Stow and Hudson ratepayers of including a portion of HudsonÕs power supply in the sale pursuant to G.L. c. 164, ¤43.

A2: Advantages to Stow: None.

Disadvantages to Stow: HL&PDÕs ÒsliceÓ (when combined with the above-cost distribution plant sale) would increase SMEDÕs rates above HL&PDÕs current rates to Stow and above HL&PDÕs rates to Hudson, which would decrease. HL&PDÕs ÒsliceÓ would be difficult or impossible for SMED to manage, due to its indeterminate size (in KWs, in KWHs, and in years) and due to its indeterminate price and due to the difficulty of purchasing wholesale power ÒaboveÓ the Òslice.Ó HL&PDÕs ÒsliceÓ would preclude SMED from enjoying any of the benefits of entering the competitive market.

Advantages to Hudson: HL&PDÕs ÒsliceÓ proposal would reduce HL&PDÕs average rates to Hudson, due to the windfall gain to HL&PD resulting from the combination of the above-cost sale of the distribution plant and the full contract cost sale of the generation plant and portfolio. HL&PDÕs ÒsliceÓ also reduces HL&PDÕs imprudent,

unreasonable, and economically disastrous dependence upon Seabrook. HL&PDÕs ÒsliceÓ also permits HL&PD the freedom to maximize HL&PDÕs new wholesale purchases on the competitive market.

Disadvantages to Hudson: None.

Q3: During the hearings, much testimony was provided concerning HudsonÕs slice-of-system proposal as well as on variations of that proposal. If the Department were to find that a portion of HudsonÕs power supply portfolio Òought in the public interest to be included in the purchaseÓ by Stow, what is the best method to effectuate that sale?

A3: No ÒsliceÓ of any size whatsoever is appropriate, for the reasons stated in ¤III and ¤IV, above. However, should the DTE determine that some ÒsliceÓ should be included in the sale, the DTE should exercise great caution not to include any ÒsliceÓ (like the one in HL&PDÕs proposal) which is so large as to preclude SMED from surviving as a municipal light plant. Everything else equal, the larger the Òslice,Ó the larger the cost impact upon SMED, and the smaller the Òslice,Ó the smaller the cost impact upon SMED. Similarly, everything else equal, the larger the Òslice,Ó the lesser the ability of SMED to manage its wholesale purchases ÒaboveÓ the Òslice,Ó and the smaller the Òslice,Ó the greater the ability of SMED to manage its wholesale purchases ÒaboveÓ the ÒsliceÓ. Accordingly, if the DTE should reject all of the points made by SMED in ¤¤III and IV, above, the DTE should nevertheless proceed with great caution in ordering any Òslice,Ó and should not order any ÒsliceÓ large enough to preclude SMED from operating successfully and from obtaining its fair share of the benefits of competition. Furthermore, any ÒsliceÓ arrangement should be limited in duration to a reasonable expectation period of no more than 10 years, beginning in 1986 (the date of HL&PDÕs last commitment of long-term capital to serve Stow). Under FERCÕs precedents pursuant to FERC 888, specifically the Alma decision, Stow has already completed the purchase of a ÒsliceÓ that is more than the required 10 years in duration.

Q4: Please comment on HudsonÕs proposal to include only long-term power supply contracts in the slice-of-system and discuss whether the public interest would be better served by also including any short-term contracts. If so, please discuss how the Department could value any short-term contract for inclusion in the sale.

A4: Short-term contracts should not be included in this sale, because that would have the effect of removing all (or most) control from SMED for additional wholesale purchases and the effect of giving control back to HL&PD. This question highlights yet another problem with HL&PDÕs ÒsliceÓ proposal. HL&PD wants to push only the expensive, long-term contracts onto SMED, and there is no way to correct the resulting inequity by also pushing HL&PDÕs short-term contracts onto SMED. This illustrates a basic fact: once the DTE buys into HL&PDÕs ÒsliceÓ proposal, no palliative addition to, or modification of, the ÒsliceÓ will produce a workable situation for SMED, unless the DTE accepts SMEDÕs point that a ÒsliceÓ of more than 10 yearsÕ duration has already been purchased by Stow. Adopting HL&PDÕs Òslice,Ó whether or not short-term contracts were added into the ÒsliceÓ as a palliative measure, would be fatal to SMED.

Q5: With respect to the slice-of-system approach, please comment on what the appropriate termination date for StowÕs obligations would be with respect to HudsonÕs long-term contracts. Specifically, comment on the following possible time periods: 1) life of unit; 2) life of bonds; 3) reasonable expectation period based on a planning horizon; and 4) any other reasonable expectation period.

A5: Consistent with FERCÕs public interest determination in the Alma decision, the termination date should be the end date of the reasonable expectation period based upon the planning horizon. This appears to be roughly 10 years for HL&PD. Ex. RH-3. The beginning date of the reasonable expectation period is 1986, the date of the last commitment of long-term capital or fixed costs by HL&PD to serve Stow. Ex. RH-2. The end of the reasonable expectation period is thus 1996, consistent with FERCÕs Alma decision, and no further payments by Stow to HL&PD are thus appropriate.

With respect to the other two choices listed by the DTE, life of the unit is preferable to life of the bonds as the bond payment streams have been accelerated in several cases to achieve retirement of the bonds before the unitsÕ retirement. RR-DTE-1 (showing bond expirations of 2018 and 2019 for Nuclear Projects 3, 4, 5, and 6, which include units

whose lives exceed these dates). In other words, a ÒsliceÓ measured by the life of the bonds would have SMED along to pay for the high-cost years, while the fixed costs were being paid, but would then not have SMED enjoy the benefits of the later low-cost years, after the fixed costs had been paid.

Accordingly, the proper measure of the duration of the ÒsliceÓ is the reasonable expectation period based upon HL&PDÕs planning horizon of about 10 years, an expectation period which terminated in 1996. Ex. RH-3. Between the other two choices, neither of which is acceptable to SMED, the life of the units measure is fairer to both parties than the life of the bonds measure.

VI. CONCLUSIONS.

For the reasons stated above, and for the reasons contained in the evidentiary record, particularly Exs. S-3, S-4, and RS-2, the DTE should re-affirm its 1996 decision in the case and grant HL&PD no stranded cost recovery, either directly through any stranded cost payments or indirectly through some so-called Òslice.Ó Alternatively, the DTE should find that since Stow has been purchasing a full ÒsliceÓ of HL&PDÕs system since 1986, and thus has been paying StowÕs full share of stranded costs for 14 years, four years longer than the reasonable expectation period, any obligation Stow could have had to purchase a ÒsliceÓ has already been fulfilled. The DTE should include adequate findings of fact and rulings of law in support of the DTEÕs re-affirmation of the DTEÕs 1996 ruling so that further judicial review will not result in a second remand.

Respectfully Submitted,

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1.

[1] Stow Municipal Electric Department v. Department of Public Utilities, 426 Mass. 341 (1997).

2.

[2] G.L. c. 164, ¤¤42 and 43 are the successor provisions to St. 1891, c. 370, ¤¤12-14, which are referred to in St. 1898, c. 143, ¤2.

3.

[3] This limited scope of MMWECÕs intervention was re-affirmed and re-emphasized by the department in its decision denying MMWECÕs motion for reconsideration. Stow Municipal Electric Department, D.P.U. 94-176-B, p. 4 (April 3, 1996).

4.

[4] Indeed, given its fairness to HL&PD in 1996, it is more than fair to HL&PD today, due to HL&PDÕs continued collection of 100% of each yearÕs share of stranded costs in the intervening four and one-half years.

5.

[5] Indeed, if it is intentionally overestimated, as it is in HL&PDÕs proposal by using a biased measure for calculating the percentage share such as load (instead of energy), a ÒsliceÓ would recover more than 100% of properly-allocated stranded costs. Ex. RS-2, pp. 10-11 [Smith].

6.

[6]Without repeating all previous arguments on this issue, SMED incorporates by reference into this ¤III(A), and re-asserts, SMEDÕs June 16, 1995 Brief on Prudence Issues, SMEDÕs August 31, 1995 Brief, pp. 52-53, and SMEDÕs July 26, 1999 Brief, pp. 8-9.

7.

[7] Unlike prudency, the department has not ruled reasonability to be an excluded issue from this case. Hearing Officer Ruling, D.P.U. 94-176, dated August 10, 1995.

8.

[8] HL&PDÕs belated efforts to reduce its stranded cost estimate, by Òsensitivity testingÓ it with other inputs (Tr. 3R:192-195 [Monteiro]) constitutes a result-oriented attempt to walk away from an estimate that HL&PD realized during the course of the hearings was harmful to HL&PDÕs case.

9.

[9] This $850 million has been reduced since then (Tr. 3R:292-293 [Smith]), just as HL&PDÕs have increased from 1995 to 2000, despite being paid down during that time.

10.

[10] Without repeating all previous arguments on this issue, SMED incorporates by reference into this ¤III(B), and re-asserts, SMEDÕs August 31, 1995 Brief, p. 57, and SMEDÕs July 26, 1999 Brief, pp. 10-11.

11.

[11] SMED incorporates by reference, and re-asserts, in this ¤III(D) the previous arguments made by SMED at: (1) SMEDÕs October 1, 1993 Brief in 93-124, at pp. 5-31; (2) SMEDÕs April 6, 1995 Brief in 94-176, at pp. 12-43; (3) in SMEDÕs August 31, 1995 Brief in 94-176, at pp. 9-46; (4) in SMEDÕs July 26, 1999 Brief in 94-176, at pp. 11-13; and (5) in SMEDÕs April 18, 2000 Memorandum of Law in Support of Motion for Summary Disposition in 94-176, at pp. 2-19.

12.

[12] SMED incorporates by reference, and re-asserts, in this ¤III(E) the previous arguments made by SMED in: (1) SMEDÕs August 31, 1995 Brief in 94-176, at pp. 17-25, 27-40, 45-46; and (2) SMEDÕs April 18, 2000 Memorandum of Law in Support of Motion for Summary Disposition in 94-176, at pp. 20-24.

13.

[13] Note the recurring phrases in Ex. RH-6, such as: ÒHL&PD along with other municipals,Ó ÒHL&PD as part of a group of municipals,Ó ÒMMWEC on behalf of HL&PD and other municipals,Ó and ÒMMWEC, on behalf of itself and the other Project Participants.Ó It is hard to locate anything HL&PD has attempted, let alone accomplished, in Ex. RH-6. Nowhere in Ex. RH-6 does either HL&PD or MMWEC demonstrate the rate impact of their mitigation attempts.

14.

[14] Had department staff not asked information request DTE-H-1-15, HL&PD presumably would never have bothered to file anything on the subject of what constitutes an appropriate ÒsliceÓ of HL&PDÕs system.

15.

[15] SMED does not wish to overstate this point. HL&PDÕs utter lack of any coherent story as to why it did what it did in the 1980Õs precludes a definitive account of its behavior. Nevertheless, there are some indications that HL&PD was buying for Hudson industrial load, not for Stow. Ex. S-4, p. 7 [Smith].

16.

[16] Mis-numbered as Article II in the trust instrument. Ex. RS-1, p. 2.